UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BANK OF AMERICA, N.A.,   :
                                                    :
                          Plaintiff,   :   Civil Action No. 10-5707 (DLC)
                                                    :
        -against-   :
                                                    :
APOLLO ENTERPRISE SOLUTIONS, LLC,   :   DECLARATION OF
APOLLO ENTERPRISE SOLUTIONS, INC., and   :   G. CHRISTOPHER IMREY
MORIAH PARTNERS, LLC,   :
                                                    :
                          Defendants.   :
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        G. Christopher Imrey declares under penalty of perjury as follows:

        1. I am the founder and former President of Apollo Enterprise Solutions, LLC,

which became Apollo Enterprise Solutions, Inc. ("Apollo") defendants named in this action. In

addition to being the founder, I am Chief Strategy Officer. I have had a position with Apollo at

all times since it was established. I reside in Newport Beach, California. The information

contained herein is based on my own personal knowledge of and involvement in the negotiation

of the Application Service Provider Agreement # APO-21064 effective April 15, 2006 (the

"Service Agreement") (*see* Wassam Decl. Exh. 1), as well as my own personal knowledge of and

involvement in the course of dealing between Apollo and Bank of America pursuant to the

Service Agreement from its effective date to the present.

        2. Apollo Enterprise Solutions, Inc., headquartered in Long Beach, California,

provides enterprise-class web-hosted solutions for a variety of industries involved in receivables

management and debt collections.

3. I was personally involved in the negotiation of the Service Agreement on behalf of Apollo with Bank of America in 2006. Julie Gonzalez and Anh Gates negotiated the contract on Bank of America's behalf. Anh Gates, a Bank of America procurement officer, signed the contract on behalf of Bank of America. Dana Wassam, who provided a Declaration in support of Bank of America's motion for a preliminary injunction, was not involved in negotiating the Service Agreement and was not part of the deployment of www.myeasypay.com website, which was changed to www.myeasypayment.com.

4. Pursuant to the Service Agreement, which was drafted by Bank of America, Apollo agreed to provide Bank of America with web-based access through the URL address www.myeasypayment.com to Apollo's proprietary Intelligent Decisioning System ("IDS") software for use by Bank of America in providing certain debt settlement services to its customers (*see* ¶ 2.1). More specifically, the intent of the parties in entering into the Service Agreement was to provide Bank of America with an online collections site for *delinquent* credit card accounts, not loan accounts as stated in Ms. Wassam's Declaration. These delinquent accounts were of two types: "collect" accounts, which were more than 30 days but less than 180 days past due, and "recovery" accounts, which were greater than 180 days past due. Although the parties anticipated that through force of habit certain previously delinquent customers might continue to use the site to make online payments even after they became current, the parties never intended that the site would be widely used for this purpose.

5. The fee schedule contained in the Service Agreement reflected the parties' understanding in this regard. The fee schedule provides for a monthly base payment of $10,500 based on an assumption of up to 170,000 web hits per month (*see* Schedule C). In the event of volumes above this level, additional charges were to be negotiated (*id.*). The Service Agreement

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also provided that Bank of America would pay significant, additional monthly charges for "collect" and "recovery" transactions based on the volume of "decisions," "settlements," and "payments" with respect to these transactions each month (*id.*). As reflected in Schedule C to the Service Agreement, the additional monthly charges for "collect" and "recovery" transactions were expected to constitute the most significant source of earnings for Apollo under the contract – an estimated $160,000 per month at the time the agreement was negotiated – far in excess of the monthly base payment of $10,500. Moreover, based on its discussions with Bank of America representatives, Apollo expected and understood that the amounts paid to it on account of "collect" and "recovery" transactions would increase over the course of the parties' relationship.

6.   From the beginning of the Services Agreement, however, Bank of America has prevented Apollo from obtaining the benefit of its bargain. As an initial matter, contrary to the parties' intention, Bank of America has used the IDS system as a key online payment portal for multiple Bank of America business divisions and account types rather than merely an online collections site for delinquent credit card accounts. As a result, usage of the site has been far in excess of the volumes contemplated by the fee schedule provided in the Services Agreement and has imposed substantial additional unreimbursed costs on Apollo. The number of Bank of America hits on the Apollo server is currently running at a rate of over 52 million per month versus the 170,000 hits provided in the Services Agreement. However, Bank of America has breached the agreement and refused to engage in good faith negotiations over the additional fees owed to Apollo as a result of these increased volumes notwithstanding frequent requests by Apollo that it do so. Indeed, in one meeting I had with Julie Gonzalez/Whitmore via telephone and her supervisor, Sharon Stockton, face to face in Delaware in 2008, Ms. Stockton warned me

to stop complaining about Bank of America's nonpayment for use of the IDS system because I would "be surprised how quickly vendors could disappear around here."

7. Ms. Wassam's assertion that "[a] web hit, as used in the Agreement, was understood by both Bank of America and Apollo to mean a unique visitor accessing the website" is incorrect and completely unsupported. Ms. Wassam was not a participant in the negotiations for the Services Agreement in 2006. The terms "web hit" and "unique visitor" are terms of art in the industry with different meanings. A web hit is simply a request to a web server for a file. http://en.wikipedia.org/wiki/Web_hit. The term "unique visitor," on the other hand, refers to a person who visits a Web site more than once within a specified period of time. *See* http://webopedia.com/TERM/U/unique_visitor.html. A knowledgeable industry person would never use the term "web hit" to mean "unique visitor," and neither Ms. Wassam nor anyone else from Bank of America ever suggested in any conversation with me that the term "web hit" as used in Service Agreement meant "unique visitor."
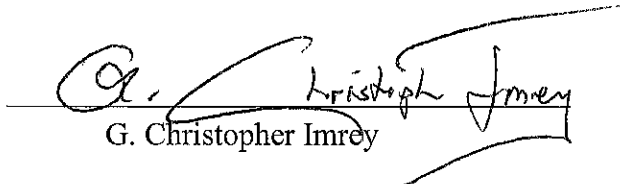
8. In addition, although the Service Agreement clearly contemplates that payments to Apollo from "collect" and "recovery" transactions would be far in excess of the monthly base amount of $10,500, this has not been the case. Information contained in batch files provided to Apollo by Bank of America understated the volume of "collect" and "recovery" transactions being processed, something Apollo did not discover until an internal audit. Bank of America had the correct information on its main frame computer but did not disclose and has never disclosed the correct information to Apollo. Prior to the internal audit, Apollo relied on the information contained in the batch files provided by Bank of America in billing it for "collect" and "recovery" transactions, and those amounts understated the amounts due under the Services Agreement.

9. Bank of America's assertion that the Services Agreement would renew automatically by its terms each year even over Apollo's objection is not consistent with the intent of the parties or the terms of the agreement. As the primary negotiator of the Services Agreement on Apollo's behalf, it was my understanding that following the initial two year term, each party had a right to object to and prevent the renewal of the Services Agreement each year. Ms. Wassam was not involved in the negotiation of the Services Agreement, and her assertions that "[t]he 180 day termination period [in paragraph 6.3 of the Services Agreement] assumed Bank of America would have a replacement service in place" and "was premised on only Bank of America having the right to terminate the Services Agreement, other than for breach" are likewise incorrect and completely unsupported. As noted above, it was the intention of the parties that each side would have an annual right to elect not to renew the Services Agreement after the two year term. In addition, paragraph 6.3 of the Services Agreement expressly states that [i]n no event shall said transition period be more than [180] calendar days."

10. Bank of America clearly has alternative means of collecting payments. In fact, its main internet portal, www.bankofamerica.com describes five different methods for making a payment to a credit card, with no reference to the Apollo website. Attachment A is a copy of a screenshot from Bank of America's website which describes those methods.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: August 16, 2010

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G. Christopher Imrey

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Credit card payments and statements

How can I make a payment to my credit card from a Bank of America® account or another financial institution?

You have 5 options to pay your Bank of America® credit card:

1. **Drop Off Payment**

   You can make payments at any Bank of America® banking center. Find the banking center most convenient to you.

2. **Pay By Phone**

   If you elect to pay by phone, please call **1.800.236.6497**.

   Note: There is no fee to make a payment by phone using a Bank of America® account. However, there is a $15.00 fee if you use an account from another financial institution to make a payment by phone.

3. **Online using a Bank of America® checking or savings account**

   Enroll in Online Banking by visiting bankofamerica.com/onlinebanking.

   Once enrolled, log-in and go to the Bill Pay tab. Click "Go to Bill Pay". (Bill Payer in WA and ID.)

   Follow the instructions provided in the "Pay To/Pay From" tab.

   Another option available is to transfer money from your Bank of America® checking or saving accounts to your Bank of America® credit card.

   Log-in to Online banking, click the "Transfers" tab and Add the Account that you would like to transfer to.

   Already enrolled in Bank of America® Online Banking? Click here.

4. **Online using an account from another financial institution's checking or money market account. (This service is not available for accounts located in WA or ID.)**

   Enroll your Bank of America® credit card in Online Banking by visiting bankofamerica.com/onlinebanking.

   Once enrolled, log-in and go to the Bill Pay tab. Click "Go to Bill Pay".

   Click on "Pay To/Pay From". Set up your credit card account under the "Pay To" tab.

   Then, click on the "Pay From" tab. You will need your bank's 9 digit routing number and account number to set up the "Pay From" account.

5. **Mail Payment**

   To mail us a payment, please use one of the mailing addresses listed below:

[+]

Feedback